82-917

No. ..-...

IN THE

# Supreme Court of the United States

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October Term, 1982

KENNETH CORY, Controller of the State of California; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Petitioners,*

*vs.*

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.**

GEORGE DEUKMEJIAN,
Attorney General of the
State of California,
RICHARD D. MARTLAND,
Assistant Attorney General,
HENRY G. ULLERICH,
Deputy Attorney General,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2266.
*Counsel for Petitioners.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## Questions Presented.

1. Whether a state constitutional amendment designed to equalize the compensation of judges performing the same duties on the same court is a law impairing the obligation of contracts in violation of article I, section 10 of the United States Constitution.

2. Whether a state constitutional amendment in November 1980, designed to equalize the compensation of judges after a State Supreme Court opinion created various pay categories dependent on terms of office, deprived judges whose pay formula was modified by the Legislature in 1976 and restored by the State Supreme Court in May 1980 of a vested contractual right in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

## Parties to the Proceeding.

The caption of the case contains the names of all parties.

Petitioners are the California State Controller who issues state warrants to state judges and the Board of Administration of the Public Employees' Retirement System which administers the benefits under the Judges Retirement Law. (Cal. Gov. Code, § 75005.)

Respondents are active or retired California Appellate Justices. The litigation was commenced as a class action on behalf of justices of the California Court of Appeal and Supreme Court justices whose salaries were adjusted in January 1981 by reason of the constitutional amendment in November 1980. Because a class action would have delayed a final decision, and a judgment of invalidity would benefit all affected judges, the action was dismissed as to all class members except the named parties.

TABLE OF CONTENTS

Page

Questions Presented ..... i
Parties to the Proceeding ..... i
Opinion Below ..... 2
Jurisdiction ..... 2
State Constitution and Statutory Provisions Involved .. 2
Statement of the Case ..... 5
Reasons Why the Writ Should Be Granted ..... 11

I.

The Decision Involved an Important Question of Federal Law ..... 11

II.

This Is the First Opportunity to Present the Issue to This Court ..... 12

III.

The Existence of a Contractual Relation to Bring a Matter Under the Impairment of Contract Prohibition Is a Federal Question and the Decision of the California Court of Appeal Conflicts With Applicable Decision of the United States Supreme Court ..... 13

A. There Is No Contract Between the State and Its Judges Binding the State to a Pay Formula for a 12-Year Term of Office ..... 13

B. A Constitutional Amendment That Attempts to Eliminate a Disparity in Judicial Salaries Is Not Without a Rational Basis and Does Not Deprive Justices of Property Without Due Process of Law ..... 18

Conclusion ..... 20

## INDEX TO APPENDICES

Page

Appendix A. Opinion of the Court of Appeal ..... App. p. 1

Modification of Opinion ..... 25

Appendix B. Order Hearing Denied, Dated September 8, 1982 ..... 26

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Amer. Ry. Exp. Co. v. Levee (1923) 263 U.S. 19 | 2 |
| Boddie v. Connecticut (1971) 401 U.S. 371 | 18, 19 |
| Borden's Co. v. Baldwin (1934) 293 U.S. 194 | 14 |
| Butler et al. v. Pennsylvania (1850) 51 U.S. 402 | 12, 17, 18 |
| Butterworth v. Boyd (1938) 12 Cal.2d 140, 82 P.2d 434 | 15 |
| Casserly v. City of Oakland (1936) 6 Cal.2d 64, 56 P.2d 237 | 19 |
| Coyne v. Rennie (1893) 97 Cal. 590, 32 P. 578 | 16 |
| Dodge v. Board of Education (1937) 302 U.S. 74 | 12, 13, 15, 16, 17 |
| Fisk v. Jefferson Police Jury (1885) 116 U.S. 131 | 17 |
| Indiana ex rel. Anderson v. Brand (1938) 303 U.S. 95 | 13, 14 |
| Irving Trust Co. v. Day (1942) 314 U.S. 556 | 13 |
| Longshore v. County of Ventura (1979) 25 Cal.3d 14, 598 P.2d 866 | 15 |
| Martello v. Superior Court (1927) 202 Cal. 400, 261 P. 476 | 19 |
| Miller v. Kister (1885) 68 Cal. 142, 8 P. 813 | 16 |
| Miller v. State of California (1977) 18 Cal.3d 808, 557 P.2d 970 | 15 |
| Moore v. East Cleveland (1977) 431 U.S. 494 | 18 |
| Nebbia v. New York (1934) 291 U.S. 502 | 18 |
| Olson v. Cory (1980) 27 Cal.3d 532, 636 P.2d 532 (Olson v. Cory I) | 5, 11, 13, 15, 18, 19 |
| Olson v. Cory (1982) 134 Cal.App.3d 85, ___ Cal.Rptr. ___ (Cory II) | 7, 10 |
| Pennie v. Reis (1889) 80 Cal. 266, 22 P. 176 | 16 |

Page

Robertson v. Miller (1928) 276 U.S. 174 ..... 17
Russell v. Sebastian (1914) 233 U.S. 195 ..... 13
United States v. Fisher (1883) 109 U.S. 143 ..... 17
United States Trust Co. v. New Jersey (1977) 431 U.S. 1 ..... 14, 15
United States v. Will (1980) 449 U.S. 200 ..... 12, 19
Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S. 562 ..... 13

Constitutions

California Constitution, Art. III, Sec. 4 ..... 6, 7, 8, 13, 19
California Constitution, Art. VI ..... 2
California Constitution, Art. VI, Sec. 16 ..... 5
United States Constitution, Art. I, Sec. 10 ..... i, 12, 14, 18
United States Constitution, Fourteenth Amendment i, 11

Statutes

California Government Code, Secs. 68200-68202 ..... 3, 5
California Government Code, Secs. 68200-68210 ..... 3
California Government Code, Sec. 68203 .... 3, 4, 5, 15
California Government Code, Sec. 75005 ..... i
California Government Code, Sec. 75025 ..... 5
California Government Code, Sec. 75032 ..... 5
California Government Code, Sec. 75034.1 ..... 5
United States Code, Title 28, Sec. 1257(3) ..... 2
United States Code, Title 28, Sec. 2101(c) ..... 2

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*Petitioners,*

*vs.*

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.**

Petitioners Kenneth Cory and Board of Administration of the Public Employees' Retirement System, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Five, filed on June 25, 1982 and modified on July 22, 1982.

**Opinion Below.**

The opinion of the California Court of Appeal appears as Appendix A hereto.

The California Supreme Court denied a petition for hearing on September 8, 1982. (Appendix B.)

**Jurisdiction.**

This petition for writ of certiorari was filed within 90 days of the denial of discretionary review by the State Supreme Court. The petition is timely. (28 U.S.C. § 2101(c); *Amer. Ry. Exp. Co. v. Levee* (1923) 263 U.S. 19.) This court's jurisdiction is invoked under 28 United States Code section 1257(3).

**State Constitution and Statutory Provisions Involved.**

California Constitution, article VI, provides:

> "SEC. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8 and 12 years.
>
> "....
>
> "(c) Terms of judges of superior courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.
>
> "....

"The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies.

"SEC. 19. The Legislature shall prescribe compensation for judges of courts of record.

"SEC. 20. The Legislature shall provide for retirements, with reasonable allowance, of judges of courts of record for age or disability."

California Government Code sections 68200-68210 provide for the compensation of justices and judges of courts of record. Sections 68200-68202 provide for a specified *annual* salary for the Chief Justices, Associate Justices of the State Supreme Court, Justices of the Court of Appeal, superior court and municipal court. Government Code section 68203 provides for modification of the specified annual salary.

Government Code section 68203, as amended in 1969, provided as follows:

"In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year."

Section 68203 was amended in 1976, effective January 1, 1977 to provide:

"On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%)."

Section 68203 was amended in 1979, effective January 1, 1980, as follows:

"On July 1, 1980, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees but not to exceed five percent, provided, however, that if in either of the two previous fiscal years the average salary increase for state employees was less than five percent, the judges or justices shall in addition receive that portion of a current increase in excess of five percent which they would have been entitled to had the increases in the two previous fiscal years each been equal to five percent.

"(b) For the purposes of this section, salary increases for state employees shall be such increases as reported by the California Office of Employee Relations.

"(c) The salary increase for judges and justices made on July 1, 1980, for the 1980-81 fiscal year, shall in no case exceed five percent."

**Statement of the Case.**

California judges first assume office through election or appointment. The appointee appears on the ballot at the first general election at which the appointee had a right to become a candidate. Once elected, the term of an appellate court judge is 12 years and superior court judge is 6 years. (Cal. Const., art. VI, § 16.)

Since 1964, the amount of annual judicial salaries has been prescribed by California Government Code sections 68200-68202, subject to increases as provided in Government Code section 68203.

In 1969, the State Legislature granted judges an automatic annual pay increase based on the consumer price index. In 1976, effective January 1, 1977, the Legislature placed a five percent (5%) annual limit on cost of living increases.

The pension to which retired judges and spouses of deceased judges were and are entitled is a percentage of the salary payable at the time payment of the pension falls due to the judge holding the judicial office to which such retired or deceased iudge was last elected or appointed. (Gov. Code, §§ 75025, 75032, 75034.1.)

On March 27, 1980, as modified on May 30, 1980 and June 27, 1980, the California Supreme Court rendered its decision in *Olson v. Cory* (1980) 27 Cal.3d 532 [636 P.2d 532] (hereinafter *Olson v. Cory I*) holding that the 1976 amendment of Government Code section 68203 could not constitutionally be applied to (i) judges during any term or any unexpired term of a predecessor judge if some portion of such term (a "Protected Term") was served prior to January 1, 1977; and (ii) judicial pensioners whose benefits are based on some proportionate amount of the salary for the office of such judge. In said decision, the Supreme Court further held that all sitting judges have contractual rights

during their terms of office to the compensation provided by law at the commencement of the term which rights are protected from impairment by the State and Federal Constitutions and article III, section 4 of the California Constitution as then in effect. The Supreme Court further noted that its decision would create a disparity in salaries within a peer group of judges, and that "[s]uch disparity will continue, in the case of trial judges, no later than the first Monday in January 1981 and, in the case of appellate justices, no later than the first Monday in January 1987."

The State Legislature then voted to place a state constitutional amendment before the people in November 1980. The state constitutional amendment was intended to eliminate the disparity in judicial compensation depending upon term. As the ballot pamphlet described the change:

> "Because of the court's ruling, there is now a two-tier salary structure for judges, one based on the 1976 law and a higher one based on the 1969 law. Thus, as of January 1981:
>
> "Four associate judges of the Supreme Court will be paid $88,685 annually, while the other two associate judges will be paid $72,855.
>
> "Twenty-three judges of the courts of appeal will be paid $83,143, while the other 36 judges of these courts will be paid $68,303.
>
> "As their terms expire, the base salaries of the judges receiving these higher amounts will be reduced to the same levels as those paid to the other judges whose salary increases are limited to 5 percent annually.
>
> "Pensions of certain retired judges and their survivors also increased as a result of the Supreme Court's ruling, because pension benefits are tied to active judges' salaries. Generally, a retired judge receives an allowance equal to either 65 percent or 75 percent of

the current salary paid to the judge holding the office to which the retired judge was last elected.

"Proposals:

"This measure would amend the State Constitution to produce the following effects:

"It would eliminate, effective January 1, 1981, the additional pay being received by each judge whose base salary was increased as a result of the Supreme Court's ruling.

"It would eliminate, effective January 1, 1981, the additional pension benefits being received by each retired judge (or survivor) as a result of the court's ruling."

On November 5, 1980, the People of the State of California amended article III, section 4 of the State Constitution to provide as follows:

"(a) Except as provided in subdivision (b), salaries of elected state officers may not be reduced during their term of office. Laws that set these salaries are appropriations.

"(b) Beginning on January 1, 1981, the base salary of a judge of a court of record shall equal the annual salary payable as of July 1, 1980, for that office had the judge been elected in 1978. The Legislature may prescribe increases in those salaries during a term of office, and it may terminate prospective increases in those salaries at any time during a term of office, but it shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office. Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article I or any other provision of law."

On December 31, 1980, 12 active and retired judges filed a class action in the Los Angeles Superior Court (sometimes referred to as *Olson v. Cory II*). The complaint was for (1) mandamus and injunctive relief and (2) declaratory relief

and injunctive relief. The complaint alleged that the Controller should disregard the November 1980 amendment to the State Constitution on the grounds that the State Constitution could not alter the pay structure in effect immediately prior to the election until the end of the "Protected Terms." The mandate cause of action alleged that the Controller's duty to disregard was compelled by the contract clause of the State and Federal Constitutions and the Supremacy Clause of the United States Constitution and the due process clause of the State and Federal Constitutions.

The second cause of action sought a declaration that the amendment to the State Constitution could not constitutionally deprive petitioners of their vested constitutional and property rights to no reduction in compensation during their terms of office and that the November 1980 amendment to article III, section 4, was unconstitutional on its face and as applied.

Respondents and defendants Kenneth Cory and Board of Administration of the Public Employees' Retirement System answered the petition and complaint. The answer denied that the article III as amended was in any way ineffective or invalid.

On January 27, 1981, respondents filed a motion for judgment on the pleadings. Petitioners responded with a motion for judgment on the pleadings and/or summary judgment. Respondents and defendants filed points and authorities in opposition to plaintiffs' motion.

On May 4, 1981, the court held that plaintiffs' Motion for Summary Judgment should be granted and defendants' Motion for Judgment on the Pleadings should be denied. The court then entered a "Declaratory Judgment" which provided in pertinent part:

"2. The Court declares that justices of the California Supreme Court and Courts of Appeal whose terms expire in 1983 or 1987 and judicial pensioners whose pension benefits are calculated based on the salaries of such justices have vested rights under the contract and due process clauses of the United States and California Constitutions to receive the compensation provided by law at the commencement of such terms or the terms of the justices on whose salaries such pension benefits are based, including the full cost of living increases provided by California Government Code Section 68203 prior to the amendment thereof effective January 1, 1977, until the expiration of their present terms or the earlier termination of their service for some other reason or, in the case of judicial pensioners, the expiration of the present terms of the justices on whose salaries such pension benefits are based.

"3. The Court declares that justices of the California Supreme Court and Courts of Appeal whose terms commenced in 1979, judges of the California Superior Courts and Municipal Courts whose terms commenced in 1977 and 1979 and judicial pensioners whose pension benefits are based on the salaries of such justices or judges have vested rights under the contract and due process clauses of the United States and California Constitutions to receive the compensation provided by law at the commencement of such terms or the terms of the justices or judges on whose salaries such pension benefits are based, including an annual cost of living increase not to exceed five percent as provided by California Government Code Section 68203 effective January 1, 1977, until the expiration of their present terms or the earlier termination of their service for some other reason or, in the case of judicial pensioners, the expiration of the terms of the justices

or judges on whose salaries such pension benefits are based."

Judgment was entered on May 6, 1981.

On appeal, the California Court of Appeal struck out the words "and California" and affirmed (2d Civil No. 63644). (*Olson v. Cory* (1982) 134 Cal.App.3d 85 [___ Cal.Rptr. ___].) The decision of the Court of Appeal was thus based solely on the ground that the state constitutional amendment as applied to some state appellate justices violates the United States Constitution.

A copy of the opinion of the Court of Appeal and modification on July 22, 1982, is attached hereto as Appendix A.

On September 8, 1982, the California Supreme Court denied a petition for hearing. (Appendix B.)

## REASONS WHY THE WRIT SHOULD BE GRANTED.

### I.

### THE DECISION INVOLVED AN IMPORTANT QUESTION OF FEDERAL LAW.

In 1976, the State Legislature attempted to adjust prospectively the annual statutory compensation of state appellate justices. The State Supreme Court, in 1980, held that the legislative power to prospectively adjust compensation during a 12-year term was restricted by the State Constitution and the Constitution of the United States.

The People of the State of California, by constitutional amendment in November 1980 attempted to remove the compensation disparity created by the State Supreme Court in *Olson v. Cory I, supra*, 27 Cal.3d 532.

The state courts have now held that neither the Legislature nor the people can adjust the pay formula prospectively because to equalize salaries would impair contracts protected by the United States Constitution or deprive judges of vested contractual rights in violation of the due process clause of the Fourteenth Amendment. (Appendix A.)

Unless the court sets aside the decision of the state court, the State Legislature and the People of the State of California cannot prospectively adjust judicial compensation during a term of office. Thus, any statutory change can only be effective as each judge begins a new term after the legislative change.

The present and future salary disparity, based upon preliminary calculations, illustrate the unfairness of the decision. Associate Justices of the State Supreme Court were paid at an annual rate of $77,226 for September 1982. Should this court deny review, Associate Justice Mosk will be paid at an annual rate of $111,326 for September 1982. Justices of the Court of Appeal were paid at an annual rate

of $72,401 for September 1982. Should this court deny review, Justices Ashby and Hastings on the Second District, Division Five, will be paid at an annual rate of $104,369 for September 1982. Assuming a 10% annual increase in consumer price index each year, by September 1986, a Court of Appeal Justice (serving a protected term) would have a salary of approximately $153,000 and an Associate Justice of the Supreme Court (serving a protected term) would have a salary of $163,000.

The relationship between a state and its employees, officers and judges is a matter that peculiarly should rest with the people of that state unless there is a *clear* deprivation of vested rights. The relationship should not be *finally* determined by state court judges deciding under the Rule of Necessity (their own compensation in issue) in apparent conflict with relevant opinions of the United States Supreme Court.

There are also the implications for California and other states in amending statutes and constitutions relating to other public offices with fixed terms of office. Economic condition may require changes immediately, not 12 years later.

This case presents solely a question of federal law. There is no factual issue. The state court determination that there is a "contract" within the meaning of article I, section 10 of the United States Constitution is not binding on this court.

The resolution of this important question of federal law by the state court conflicts with *Dodge v. Board of Education* (1937) 302 U.S. 74; *Butler et al. v. Pennsylvania* (1850) 51 U.S. 402, 404; and the reasoning of *United States v. Will* (1980) 449 U.S. 200.

## II.

## THIS IS THE FIRST OPPORTUNITY TO PRESENT THE ISSUE TO THIS COURT.

The California Court of Appeal held that it was bound by the decision of the State Supreme Court in 1980 on issues falling within the Federal Constitution.

The decision of the State Supreme Court in 1980 (27 Cal.3d 532 [636 P.2d 532]) could not have been reviewed by this court at that time. The decision was clearly based on independent state grounds—that changing the pay formula prospectively was a reduction of "salaries" of state officers during their terms in violation of article III, section 4 of the State Constitution. This court will not review a state court judgment based upon an adequate and independent non-federal ground. (*Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 566.)

## III.

## THE EXISTENCE OF A CONTRACTUAL RELATION TO BRING A MATTER UNDER THE IMPAIRMENT OF CONTRACT PROHIBITION IS A FEDERAL QUESTION AND THE DECISION OF THE CALIFORNIA COURT OF APPEAL CONFLICTS WITH APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court makes an independent determination whether there is a "contract" within the meaning of the United States Constitution. (*Dodge v. Board of Education, supra*, 302 U.S. 74, 79; *Russell v. Sebastian* (1914) 233 U.S. 195, 202.)

### A. There Is No Contract Between the State and Its Judges Binding the State to a Pay Formula for a 12-Year Term of Office.

In considering whether a state statute impairs the obligation of a contract, "the existence of the contract and the nature and extent of its obligation become federal questions" (*Irving Trust Co. v. Day* (1942) 314 U.S. 556, 561) which are to be determined by "an appraisal of the statutes of the state and the decisions of its courts." (*Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95 at p. 100.) The burden of showing the unconstitutionality of a statute, of course, rests on the party which attacks its validity and every

legislative enactment carries a strong presumption of constitutionality (*Borden's Co. v. Baldwin* (1934) 293 U.S. 194, 209).

The principal function of a legislative body is not to make contracts but to make laws which delcare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy. Nevertheless, a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state or its subdivisions with the protection of article I, section 10. (*Indiana ex rel. Anderson v. Brand, supra*, 303 U.S. 95 at p. 100.)

This case does not involve the circumstances of a contract in fact bargained for by the parties and couched in contractual terms such as in *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1 (covenants with holders of bonds issued by public authorities).

Generally, a statute will itself be treated as a contract when its language and the circumstances manifest a legislative intent to create private rights of a contractual nature enforceable against the state. In *Indiana, supra*, for example, the statute in question employed the term "contract" a total of 25 times, defining the relation of teachers to the school district and stating the conditions for a teacher's termination. Moreover, "[t]he tenor of the Act indicates that the word 'contract' was not used inadvertently or in other than its usual legal meaning" and prior decisions of the state's highest court interpreting that statute had uniformly held the rights created pursuant to it to be contractual in nature. (*Indiana, supra*, at p. 105.) Under those circumstances, the United States Supreme Court found that the obligation fell within the ambit of section 10 of article I.

On the other hand, certain types of legislative acts, including those fixing salaries and compensation, or setting the term and tenure of public officers, are not presumed to create a contract: "The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the Legislature shall ordain otherwise. . . . If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right." (*Dodge v. Board of Education, supra*, 302 U.S. 74, 79.)

See *United States Trust Co. v. New Jersey, supra*, 431 U.S. at p. 17, fn. 14.

The California statutes contain no words of contract. There is no hint in the statutes that the consent or agreement of any person is required for the statute to have its intended effect. The matter addressed by the statutes, payment of annual salary, is a usual term or condition of public employment or officer. Government Code section 68203 is the type of legislative acts that create no private contractual rights.

Nor did California case law prior to *Olson v. Cory, supra*, 27 Cal.3d 532 [636 P.2d 532], suggest that there was a contract that bound the state to a pay formula for a term of office.

*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 23 [598 P.2d 866] (right to compensation ripens into contractual obligation *only* upon performance of the work); *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [557 P.2d 970] (terms and conditions of employment found by statute not by contract — therefore no deprivation of property to compel retirement); *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150 [82 P.2d 434] (reduction of net salary by

imposition of deduction of health benefits); *Coyne v. Rennie* (1893) 97 Cal. 590, 593 [32 P. 578] (salary specified in charter may be reduced, "[a]lthough the term and salary may be named in the charter, yet there is no contract for a stipulated time or price that is binding on the public"); *Pennie v. Reis* (1889) 80 Cal. 266, 269 [22 P. 176] (reduction of benefits permissible); *Miller v. Kister* (1885) 68 Cal. 142, 144 [8 P. 813] ("[I]t is well settled that salaried public offices, created by the legislature, are not held by contract . . . The legislature . . . may abolish them altogether, or impose upon them new duties or reduce their salaries").

The opinions of this court have clearly held that *prospective* adjustments in compensation do not impair a contract.

In *Dodge v. Board of Education, supra*, 302 U.S. 74, the Illinois Legislature compelled teachers to retire at specified ages and required an annual annuity of at least $1,500. Ten years later, a statute reduced the annuity to $500. The court's opinion provides in part:

> "The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.
>
> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement

of disputed rights and defines its terms. *On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature.* This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right." (Emphasis added.) (302 U.S. at pp. 78-79.)

Accord: *Robertson v. Miller* (1928) 276 U.S. 174, 178-179; *Fisk v. Jefferson Police Jury* (1885) 116 U.S. 131, 133-134; *United States v. Fisher* (1883) 109 U.S. 143, 145.

In *Butler et al. v. Pennsylvania, supra*, 51 U.S. 402 at 416, the Legislature changed the pay of canal commissioners during their terms. The Supreme Court rejected the impairment of contract argument as follows:

". . . The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too

> are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being . . . shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense."

Thus, under the California statutes and the prior decisions of this court and the California Supreme Court (with the exception of *Olson v. Cory I*), there is no contract within the meaning of article I, section 10 of the United States Constitution binding the Legislature not to prospectively change the pay formula during the judicial term.

**B. A Constitutional Amendment That Attempts to Eliminate a Disparity in Judicial Salaries Is Not Without a Rational Basis and Does Not Deprive Justices of Property Without Due Process of Law.**

A State Legislature or the people through constitutional amendment do not deprive persons of liberty or property without due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality. See generally: *Moore v. East Cleveland* (1977) 431 U.S. 494, 542-551, White J. dissenting; (*Nebbia v. New York* (1934) 291 U.S. 502, 525). The ultimate determination is whether as enacted or applied (*Boddie v.*

*Connecticut* (1971) 401 U.S. 371, 379-380) the amendment is reasonable and proper or arbitrary and oppressive.

The amendment is reasonable. For the reasons previously expressed, there is no vested contractual right to a statutory formula for a term of office.[1]

Federal judges challenged a change in their pay formula. This court held that a salary increase for federal judges *vests* only when *a particular increase takes effect*. Therefore, Congress, acting before a particular increase takes effect, could modify a statutorily defined formula for annual cost of living increases in the compensation of federal judges. (*United States v. Will, supra*, 449 U.S. 200.)

Furthermore, the State Supreme Court in 1980 was interpreting state statutes in finding a "contract." Upon the amendment of a Constitution, those statutes inconsistent with the amendment became unconstitutional. (*Martello v. Superior Court* (1927) 202 Cal. 400 [261 P. 476] (abolition of the office of judge pro tempore by state constitutional amendment was not an unconstitutional impairment of the obligation of a contract as to such judge and parties litigant).)

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[1]The vested contractual rights of *pensioners* are dependent on resolution of validity of article III, section 4, as applied to *active judges*.

As Justice Clark noted in *Olson v. Cory, supra*, 27 Cal.3d 532 at pp. 541-542 [636 P.2d 532]:

> "Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed. (See *e.g.*, Gov. Code, §§ 75032, 75033.5, 7506.6, 75076, 75077, 75091, 75093, 75094, 75096, 75096.1, 75096.3.) Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment except when the judge holding the particular judicial office could also claim such an impairment. The resolution of pensioner vested rights, then, is dependent on the foregoing resolution of judges' vested rights left unimpaired by the 1976 amendment." (Accord: *Casserly v. City of Oakland* (1936) 6 Cal.2d 64, 69 [56 P.2d 237].)

It is not irrational for the people to equalize the salary of Associate Justices of the Supreme Court to avoid having one justice paid $111,326 and another justice $77,226. Nor did the United States Constitution require the people to increase all the salaries to $111,326 in order to equalize compensation.[2]

**Conclusion.**

For the foregoing reasons, the California Court of Appeal has decided a federal question in conflict with the applicable decisions of this court. The state court felt bound by a prior decision of the State Supreme Court that could not then be reviewed by this court. This court should *now* review the federal question by granting the petition.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General of the
State of California,
RICHARD D. MARTLAND,
Assistant Attorney General,
HENRY G. ULLERICH,
Deputy Attorney General,
*Counsel for Petitioners.*

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[2]The approximate monetary impact of the decision in terms of *back* pay from January 1, 1981 to December 31, 1982 is $965,000.

## APPENDIX A.

### Opinion.

Certified for Publication.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Lester E. Olson, Edwin F. Beach, Charles Bierschbach, Gerald Brown, Hugh A. Evans, et al., Petitioners, Plaintiffs and Respondents, v. Kenneth Cory, as Controller of the State of California, et al., Respondents, Defendants and Appellants. 2d Civil No. 63644. (Super. Ct. No. CA000662).

Filed: June 25, 1982.

This is an appeal from a judgment granting plaintiffs' motion for judgment on the pleadings and/or summary judgment and declaring that article III, section 4 of the California Constitution, as amended and adopted at the November 4, 1980, General Election, cannot constitutionally be applied to adjust the salary of active judges during their term of office, or adjust the retirement benefits of retired judges calculated on the basis of the salary of active judges.

THE FACTS

The undisputed facts are as follows: In 1980 the California Supreme Court held that statutory amendments to Government Code section 68203 could not be applied prospectively to adjust salaries of judges during their term of office. (*Olson v. Cory* (1980) 27 Cal.3d 532, (hereinafter "*Olson v. Cory I*").)

On November 4, 1980, at a general election the people of the State of California amended article III, section 4 of the State Constitution to provide as follows:

> "(a) Except as provided in subdivision (b), salaries of elected state officers may not be reduced during their

term of office. Laws that set these salaries are appropriations.

"(b) Beginning on January 1, 1981, the base salary of a judge of a court of record shall equal the annual salary payable as of July 1, 1980, for that office had the judge been elected in 1978. The Legislature may prescribe increases in those salaries during a term of office, and it may terminate prospective increases in those salaries at any time during a term of office, but it shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office. Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article 1 or any other provision of law."

Twelve active and retired judges then filed a class action in 1980 for mandamus, injunctive and declaratory relief, alleging that the 1980 amendment to the State Constitution could not alter the pay structure in effect immediately prior to the election until the end of the "protected terms" for those judges falling within "protected terms." The grounds for this contention included the contract clause and due process clause of the state and federal constitutions and principles of res judicata and collateral estoppel. All unnamed class members were dismissed on motion of plaintiffs, and the case was no longer a class action.

The trial court granted plaintiffs' motion for summary judgment, denied defendants' motion for judgment on the pleadings and entered a declaratory judgment from which an appeal was taken.

California judges first assume office through election or appointment. If appointed, the appointee appears on the ballot at the first general election at which the appointee has a right to become a candidate. Once elected, the term of an appellate court judge is 12 years and superior court judge

is 6 years. (Cal. Const., art. VI, § 16.) Since 1964, the amount of judicial salaries has been prescribed by Government Code sections 68200-68202, subject to increases as provided for in section 68203.

Section 68203, as amended in 1969, provided:

> "In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year."

Section 68203 was again amended in 1976, effective January 1, 1977, to provide:

> "On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, *but not to exceed five percent* (5%)." (Emphasis added.)

Section 68203 was further amended in 1979, effective January 1, 1980, as follows:

> "On July 1, 1980, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the

then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees *but not to exceed five percent*, provided, however that if in either of the two previous fiscal years the average salary increase for state employees was less than five percent, the judges or justices shall in addition receive that portion of a current increase in excess of five percent which they would have been entitled to had the increases in the two previous fiscal years each been equal to five percent.

"(b) For the purposes of this section, salary increases for state employees shall be such increases as reported by the California Office of Employee Relations.

"(c) The salary increase for judges and justices made on July 1, 1980, for the 1980-81 fiscal year, *shall in no case exceed five percent.*" (Emphasis added.)

The pension to which retired judges and spouses of deceased judges were and are entitled is a percentage of the salary payable at the time payment of the pension falls due to the judge holding the judicial office to which such retired or deceased judge was last elected to or appointed.

*Olson v. Cory I*, held that the 1976 amendment to Government Code section 68203 could not be applied constitutionally to (1) judges during any term or any unexpired term of a predecessor judge if some portion of such term (a "protected term") was served prior to January 1, 1977; and to (2) judicial pensioners whose benefits are based on some proportionate amount of the salary for the office of such judges. The court declared that all sitting judges have, during their term of office, contractual rights to the compensation provided by law at the commencement of the term; and judicial pensioners have vested rights. The court

noted that this decision would create a disparity in salaries and that such ". . . disparity will continue, in the case of trial judges, no later than the first Monday in January 1981 and, in the case of appellate justices, no latter than the first Monday in January 1987." (27 Cal.3d at p. 547.)

The state constitutional amendment in November 1980 was intended to eliminate that disparity. The ballot pamphlet described the change:

> "Because of the court's ruling, there is now a two-tier salary structure for judges, one based on the 1976 law and a higher one based on the 1969 law. Thus, as of January 1981:
>
> "Four associate judges of the Supreme Court will be paid $88,685 annually, while the other two associate judges will be paid $72,855.
>
> "Twenty-three judges of the courts of appeal will be paid $83,143, while the other 36 judges of these courts will be paid $63,303.
>
> "As their terms expire, the base salaries of the judges receiving these higher amounts will be reduced to the same levels as those paid to the other judges whose salary increases are limited to 5 percent annually.
>
> "Pensions of certain retired judges and their survivors also increased as a result of the Supreme Court's ruling, because pension benefits are tied to active judges' salaries. Generally, a retired judge receives an allowance equal to either 65 percent or 75 percent of the current salary paid to the judge holding the office to which the retired judge was last elected.
>
> "Proposals:
>
> "This measure would amend the State Constitution to produce the following effects:
>
> "It would eliminate, effective January 1, 1981, the additional pay being received by each judge whose

base salary was increased as a result of the Supreme Court's ruling.

"It would eliminate, effective January 1, 1981, the additional pension benefits being received by each retired judge (or survivor) as a result of the court's ruling.

"It would authorize the Legislature to terminate expected increases in judges' salaries during their term of office, provided that such action does not cause a reduction in the actual salaries paid to judges during their term.

"It would specifically provide that salaries of judges are not considered an obligation of contract."

The controller is paying plaintiffs in accordance with article III, section 4, as amended November 4, 1980.

## THE ISSUES

1. Is article III, section 4 of the California Constitution, as amended, ineffective as applied to the "protected" class of judges under the:

a. Impairment of contracts clause of the federal Constitution?

b. Due process clause of the 14th Amendment to the federal Constitution?

2. Is article III, section 4, of the California Constitution, as amended, ineffective as applied to the "protected" class of judges under the impairment of contracts and due process clauses of the California Constitution?

3. Do the doctrines of res judicata and estoppel by judgment preclude defendants from relitigating issues determined in *Olson v. Cory I* as to:

a. Issues falling within the federal Constitution?

b. Issues falling within the California Constitution:

4. Does the doctrine of stare decisis compel this Court of Appeal to uphold plaintiffs' rights as adjudicated in *Olson v. Cory I* as to:

a. Issues falling within the federal Constitution?

b. Issues falling within the California Constitution?

## CONFLICT OF INTEREST

At the outset we revisit the subject of conflict of interest. *Olson v. Cory I, supra*, 27 Cal.3d 532, states at page 537:

> "We consider first whether we may hear and adjudicate the cause, recognizing each member of this court is financially interested in the outcome. The rule of necessity provides that a judge is not disqualified from adjudicating a cause because of personal financial interest if there is no other judge or court available to hear and resolve the cause. [Citation.] It is immediately apparent that all California judges have at least an involuntary financial interest in this case. To disqualify one would disqualify all, depriving them and their surviving spouses of opportunity to litigate their case. This court as now constituted is qualified to hear and determine the issues before us."

This holding by the California Supreme Court is reinforced by the later case of *United States v. Will* (1980) 449 U.S. 200 [66 L.Ed.2d 392, 101 S.Ct. 471], dealing with federal laws stopping or reducing previously authorized cost-of-living increases for federal judges. The court observes (449 U.S. at p. 210): "Although it is clear that the District Judges and all Justices of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction." The historical foundations of the rule of necessity being discussed (449 U.S. at pp. 212-217), the court quoted F. Pollack, A First Book of Jurisprudence (6th ed. 1929) 270 at p. 213, as follows:

" '[A]lthough a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet *he not only may but must do so if the case cannot be heard otherwise.*' " (Emphasis added.)

## DISCUSSION

Much of *Olson v. Cory I*, is directly applicable and binding in *Olson v. Cory II* at bar. *Olson v. Cory I* holds at pages 537-538:

"We recognize the often quoted language that public employment is not held by contract and therefore is not protected by the contract clause. . . . On the other hand, we deal here with the right to compensation by persons serving their term of public office to which they have undisputed rights. '[P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution. . . .' [Citations.] Promised compensation is one such protected right. [Citations.] Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. [Citation.] When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected. [Citations.] In the instance case the Legislature in 1969 adopted the full cost-of-living increase provision, binding this state to pay persons employed at the represented compensation for their term of office."

The court then set forth the circumstances in which it is constitutionally permissible to impair a vested right under a contract, and reaffirmed the standards adopted by the United States Supreme Court concerning article I, section 10, clause 1 of the United States Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." The court held at 27 Cal.3d 532, 539:

"In *Sonoma County Organization of Public Employees v. County of Sonoma, supra,* 23 Cal.3d 296, this court reiterated the four factors identified by the United States Supreme Court in *Home Building and Loan Assn. v. Blaisdell* (1934) 290 U.S. 398 . . . warranting legislative impairment of vested contract rights. Those factors are: (1) the enactment serves to protect basic interests of society, (2) there is an emergency justification for the enatment, (3) the enactment is appropriate for the emergency, and (4) the enactment is designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment. [Citation.]

"In applying these standards the enactment's severity must be measured to determine 'the height of the hurdle the state legislation must clear.' (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234.) . . . This court stated in *Sonoma County* that impairing a granted increase in wages goes to the heart of the employment contract and is therefore severe and permanent. [Citation.] Therefore the state's hurdle in applying the four factors in the instant case is heightened because section 68203 is an impairment affecting the heart of the employment contract.

"Defendants, offering no reason or justification for the state action, fail even to approach their burden of demonstrating the impairment of plaintiffs' rights is warranted by an 'emergency' serving to protect a 'basic interest of society.' "

We note that the language of Proposition 11 which amended article II, section 4 of the California Constitution does not even attempt to set forth or justify its compliance with the factors set forth in *Home Building and Loan Association, supra,* 290 U.S. 398. Nor do defendants endeavor to show that the amended article III, section 4 meets the

federal criteria for constitutionality under the contracts clause (or Fourteenth Amendment due process, *infra*). Neither the legislative analyst nor those arguing in favor or against Proposition 11 contend that this is an assertion of the "police power" by the people of California.

The court in *Olson v. Cory I* concludes at page 540:

> "A judge who completes one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits then offered by the state for the different term. Thus, while a judge is entitled to a salary based on unmodified Government Code section 68203 throughout a term ending, for instance, in 1978, his salary for a new term beginning on or after the effective date of the 1976 amendment — 1 January 1977 — will be governed by the statute as amended. Likewise, a judge entering office for the first time on or after 1 January 1977, including a judge entering upon his own term or upon the unexpired term of a predecessor judge, cannot claim any benefit based on section 68203 before the 1976 amendment."[1]

1. Is California Constitution article III, section 4, as amended by Proposition 11 ineffective as applied to the protected class of judges? Yes.

*Olson v. Cory I*, held that the public employment of judges gives rise to certain rights such as that of promised compensation; that this right to promised compensation may (and does as to the "protected" class of judges) become a vested right; and that this vested right could not be im-

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[1]Since California Constitution, article III, section 4, itself was amended, plaintiffs do not contend (as they did in *Olson v. Cory I*) that there is an unconstitutional reduction of judicial salaries during judges' terms of office in derogation of the original article III section 4. Hence we disregard this point, which, if urged, would indeed be circular reasoning.

paired by the State of California unless the statute seeking to impair the contract met the criteria of *Home Building and Loan Assn. v. Blaisdell, supra,* 290 U.S. 398 and *Allied Structural Steel Co. v. Spannaus, supra,* (438 U.S. 234), (*Olson v. Cory I, supra,* 27 Cal.3d 532 at pp. 538-539).[2]

Defendants argue that *Olson v. Cory I* did not squarely hold that the "protected" class of judges possessed a vested contract right that was impermissibily impaired by the offending legislation. We find that the quoted language on pages 538-539 does so squarely hold. Moreover, the Supreme Court affirmed the trial court judgment which was decided in part upon the federal constitutional issues, stating at pages 536-537:

"The statute as amended was held unconstitutional by the superior court on grounds it constitutes an impermissible impairment of vested contractual rights (U.S. Const., art I, § 10; Cal. Const., art. I, § 9) . . ." Moreover defendants admit in their answer to the complaint that the *Olson v. Cory I* holding was based in part upon the contract clause of the federal constitution (Complaint par. 23 and Answer par. 23). [JA 9, 10, 25]

Does it make any difference that in *Olson v. Cory II* we deal with a constitutional amendment rather than a legis-

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[2]"Until recent years, the contracts clause of the constitution was thought to be a dead letter. After vigorous application in the nineteenth century, the clause — along with other judicial devices for protecting economic rights — fell into disuse in the late 1930s. During the following four decades, the Supreme Court invoked the clause only twice. In 1977, however, the Court invalidated the repeal of a public bond convenant on grounds of contract impairment. The following year, the Court overturned a state pension law as imposing unbargained-for obligations upon a party to a private contract. These decisions have signaled a new activism in the Supreme Court's use of the contract clause to protect economic rights." (Fns. omitted.) (Note, A Process-Oriented Approach to the Contracts Clause (1980) 89 Yale L.J. 1623, 1623-1624.)

lative statute as in *Olson v. Cory I*? From a federal constitutional standpoint this is a distinction without a difference, as contract rights are protected from state impairment from whatever source. The contract clause of the federal constution ". . . applies to any enactment to which the state gives the force of law, including its Constitution." (*Lyson v. Flournoy* (1969) 271 Cal.App.2d 774, 779). In *Russell v. Sebastian* (1914) 233 U.S. 195, 210, the United States Supreme Court held that an amendment to the California Constitution could not operate to take away a vested contractual right. California cases to the same effect are *Favot v. Kingsbury* (1929) 98 Cal.App. 284, 291 and *Oakland Paving Co. v. Barstow* (1889) 79 Cal. 45, 47.

In *Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 550 the court held that a provision of the California Constitution cannot be applied retroactively to impair the obligation of contracts.

A similar result was reached by the Michigan Supreme Court in *Campbell v. Michigan Judges Retirement Board* (Mich. 1966) 143 N.W.2d 755, 757:

> "[The] Michigan Constitution of 1908 . . . and Article I, Section 10 of the United States Constitution, prohibit the impairment by state law of the obligation of a contract. Vested rights acquired under contract may not be destroyed by subsequent State legislation or *even by an amendment of the State Constitution*. . . .
>
> "When . . . [the plaintiffs] so retired and ceased to be members of the system, their contract was completely executed and their rights thereupon became vested. These could not, thereafter, be diminished or

impaired by legislative change of the judges retirement statute." (Emphasis added.)[3]

Defendants contend that the question of the application of the contracts clause of the federal constitution is a question of federal law to be determined by the United States Supreme Court rather than the California Supreme Court and that federal law defines vested contract rights of governmental officers in a different way than does California. First of all, it is the obligation of all state courts (as it is of all federal courts) to follow the Constitution of the United States which is the supreme law of the land. (U.S. Const., art. VI, § 2 and Cal. Const., art. III, § 1.) Since the adoption of the United States Constitution this has been a concurrent obligation of the state courts.[4]

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[3]An example in another field of the right and obligation of the California Supreme Court to strike down a provision of the California Constitution is *Mulkey v. Reitman* (1966) 64 Cal.2d 529, in which the court struck down article I, section 26 (Proposition 14) prohibiting the state from interfering with a person's absolute discretion to decline to sell or lease his property to whomever he chooses. The court stated at 533:

> "We note preliminarily that although we are examining a provision which, by its enactment by ballot, has been accorded state constitutional statute, the supremacy clause of the United States Constitution nevertheless compels that section 26, like any other state law, conform to federal constitutional standards before it may be enforced against persons who are entitled to protection under that Constitution."

[4]Prior to the Judiciary Act of 1875 (18 Stat. 470) state courts were relied upon to decide almost all federal question cases in the first instance. Alexander Hamilton predicted such utilization of state courts in The Federalist No. 82: "[B]ut I hold that the state courts will be divested of no par of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature; they will of course take cognizance of the causes to which those may give birth."

Second, the problem involves deciding both state and federal law — not merely federal law.[5] We look to California law rather than federal law to ascertain whether plaintiffs' rights are protected by contract. *Olson v. Cory I* says, "Yes." However, the last sentence of Proposition 11 states: "Laws setting the salaries of judges shall not constitute an obligation of contract pursuant to Section 9 of Article 1 or any other provision of law." Does that constitutional amendment change the applicable law of California with regard to judicial contract rights? Yes, for the future. No, insofar as the vested contractual rights of plaintiffs are concerned. In construing the federal contracts clause, the process is an follows: First, the reviewing court must look to the definition of contract rights as defined in a particular state (in this case, California) prior to the statute or state constitutional amendment changing such state law. Second,

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[5]The distinction is well stated in Hale, *The Supreme Court and the Contract Clause: III*, (1944) 57 Harv.L.Rev. 852, 869:

> "The nature and extent of the obligation, however, are federal questions only in the sense that federal courts must decide them, but they are federal questions of *state* law. In deciding such questions, federal courts must consider state decisions. What the obligation was at the time when the statute under review was enacted depends on the settled rule of state decisions made prior thereto, if there had been any such settled rule."

Federal courts retain the power to determine what the state law is in order to insure that a state court (or legislature or constitutional amendment) by a new construction of state law, does not permit an impairment of contract. The federal courts do not look to federal law to see whether a contract exists and the scope thereof, because the original state law has determined the contract rights which are in question. In *State of Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95 [87 L.Ed. 685, 58 S.Ct. 443] the Supreme Court looked at Indiana law to determine whether a teacher had a vested contractual right to her position. The court said at 100:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made. . . ."

the reviewing court follows the constitutional decisions of the United States Supreme Court defining the effect of the federal contracts clause. If the legislative change or state constitutional amendment falls afoul of the federal contracts clause, the change may have only prospective but not retrospective effect.

Defendants cite *United States v. Will, supra,* 449 U.S. 200 as favoring their position. Interlocking federal statutes fix the compensation of high-level federal officials including federal judges, and provide for annual cost-of-living adjustments determined the same way as for federal employees generally. In four consecutive fiscal years Congress enacted statutes to stop or reduce previously authorized cost-of-living increases intended to become automatically operative. In Years 2 and 3 the statutes became law before the start of the fiscal year, and in Years 1 and 4 became law after the first day of the respective fiscal year. The court held that the statutes for Years 1 and 4 were ineffective because they violated the constitutional provision against diminishing a judge's salary while in office. For Years 2 and 3 they did not violate the constitutional provision since they became law before the salary was in effect.

The court held (449 U.S. at p. 229):

> ". . . [T]hat a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges. With regard to Year 2, we hold that the Compensation Clause did not prohibit Congress from repealing the planned but not yet effective cost-of-living adjustment of October 1, 1977, when it did so before October 1, the time it was first scheduled to become part of judges' compensation. The statute in Year 2 thus represents a constitutionally valid exercise of legislative authority."

The United States Supreme Court reached a different result with respect to federal laws changing future increases in judicial compensation than did the California Supreme Court with respect to state statutes. This difference in result does not mean *Olson v. Cory I* is erroneous because:

(1) Federal Article III judges are appointed for life, in contrast to California judges who are elected for specific terms;

(2) The federal rule as to vesting of contract rights is different than the California rule:

(3) The United States Supreme Court was only concerned with the federal constitutional provision preventing diminution of judicial salaries. It was not concerned with the Fifth Amendment prohibition against deprivation of vested property rights, since it had held that the federal judges had no vested rights until the start of a particular fiscal year;

(4) Under stare decisis this court is bound by *Olson v. Cory I*, on the issue discussed above whether or not it be termed "erroneous" by defendants.

Therefore, following the law as declared in *Olson v. Cory I*, Proposition 11 is ineffective as applied to the protected class of judges because it is in derogation of the contracts clause of the federal Constitution.

b. Is Proposition 11 ineffective as applied to the protected class of judges because it is in derogation of the due process clause of the 14th Amendment to the federal Constitution? Yes.

*Olson v. Cory I, supra*, 27 Cal.3d 532 states at page 540:

> "The 1976 amendment, in addition to impairing the vested rights of judges in offices, also impairs those of judicial pensioners."

If a state impairs a vested contractual right without meeting the *Blaisdell* criteria (*Home Building and Loan Assn v. Blaisdell, supra*, 290 U.S. 398), it falls afoul of the contracts clause of the federal Constitution. If a state impairs a *vested* right which does not happen to arise out of contract (*e.g.*, a *vested* property interest) there may be an infringement of the 14th Amendment to the federal Constitution.[6] This is one aspect of the doctrine of substantive due process which has survived the decline in popularity of that concept in the 1940's when applied to state interference with personal rights.

Even if there were no contracts clause in the federal Constitution, state action impairing a vested right which does not meet the appropriate constitutional criteria per-

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[6]Hale, The Supreme Court and the Contracts Clause: III, (1944) 57 Harv.L.Rev. 852, 886-887, and at 890-891:

> "The development of criteria of the reasonableness of statutes impairing contract obligations is still in an early stage. *It can be said, however, that there is at least a tendency for the contract clause and the due process clause to coalesce.* Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be a deprivation of property without due process, contrary to the Fifth Amendment. And a state law which impaired obligations in a manner which the Court deemed reasonable would be held valid. The fact that a person is deprived of a contract right rather than a different sort of property may make legislation seem to the judges more, or less, reasonable in a particular case. *But the results might be the same if the contract clause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property.*" (Emphasis added.)

See dissent in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. [67 L.Ed.2d 551, 565-567, fns. 2 & 3.]

mitting impairment should be regarded as contrary to the due process clause in the 14th Amendment.[7]

Since the protected class of judges possesses *vested* rights (which incidentally happen also to be *vested contractual rights*), infringement by the State of California of these *vested* rights is in derogation of the due process clause of the federal Constitution.

2. Is Proposition 11 ineffective as applied to the protected class of judges with respect to the contracts clause and due process clause of the California Constitution? No.

Proposition 11 is itself a constitutional amendment, and to the extent that it amends or replaces other provisions of the state Constitution, it must prevail as it is the latest enactment on the subject matter it covers. Article I, section 9 of the California Constitution, prohibiting impairment of obligation of contracts is superseded to the extent of the subject matter of article III, section 4, as amended.[8] Even if Proposition 11 were specific enough to repeal the California due process clause as to judicial salaries, it would not be dispositive of the case because of the federal constitutional provision, *supra*.

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[7]Since defendants do not endeavor to support Proposition 11 as an exercise by the electorate of "police power," nor would the wording or legislative history of the enactment support such an endeavor, there is no need to delve into the complex field of determining whether the vested rights of the judges otherwise protected under the federal due process clause might theoretically be encroached upon *if* there were a proper exercise of "police power." (See Cunningham & Kremer, Vested Rights, Estoppel, and the Land Development Process (1978) 29 Hastings L.J. 625, 633, fn. 26, pp. 663-664.)

[8]If there were any doubt as to whether California Constitution, article III, section 4, as amended, supersedes the earlier constitutional provisions, the printed arguments on the ballot clearly show that the intent of Proposition 11 was to overturn *Olson v. Cory* and that any disparity in judges' salaries was to be swept away, despite any contrary reasons which might theretofore have existed. These printed arguments may be properly used in interpreting a constitutional amendment. (*Miro v. Superior Court* (1970) 5 Cal.App.3d 87, 96-97.)

Aside from the federal constitutional provisions, discussed above, there is no inalienable right or natural law which might arguably be above the California Constitution. (See *Nougues v. Douglass* (1857) 7 Cal. 65, 69-70.)

Since there is no basis for contending that the effect of article III, section 4, as amended, is modified or controlled in any way by any prior provision of the California Constitution, Proposition 11 is valid and effective with respect to California (in contrast to federal) constitutional principles and law.

The trial court in its declaratory judgment ". . . declares that . . . Proposition 11 . . . cannot constitutionally be applied . . . to deprive judges . . . of their vested rights under the contract and due process clause of the United States *and California* Constitutions. [JA 154, l. 8-15]. The court also ". . . declares that justices . . . have vested rights under the contract and due process clauses of the United States *and California* Constitutions. . . ." [JA 154, l. 16-21] (Emphasis added.) The words "and California" in the declaratory judgment are used in error and in this respect the judgment must be modified.

3. Do the doctrines of res judicata and estoppel by judgment preclude defendants from relitigating issues determined in *Olson v. Cory I* as to:

a. Issues falling within the federal Constitution? Yes.

If the doctrines of res judicata and estoppel by judgment apply to *Olson v. Cory II* by reason of the effect of *Olson v. Cory I*, then plaintiffs would be entitled to judgment for that reason alone. The factual issues are the same and many, but not all, of the legal issues are the same. Defendants contend that there are changed conditions of law since passage of Proposition 11 and for that reason the doctrines of

res judicata and estoppel by judgment should not act as a bar.

Tentative Draft No. 4 (1977) Restatement Second of Judgments, section 68.1 contains the language:

> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> ". . . . . .
>
> "(b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) *a new determination is warranted in order to take account of an intervening change in the applicable legal context* or otherwise to avoid inequitable administration of the laws. . . ." (Emphasis added.)

There has been an intervening change in the legal context since *Olson v. Cory I*, namely the passage of Proposition 11. But has there been a change in the *applicable* legal context? There has been no change in the federal Constitution or decisions interpreting it since *Olson v. Cory I* that would affect the applicable federal constitutional doctrines.

Appellants urge that because *Olson v. Cory I* is "erroneous" the doctrines of res judicata and estoppel by judgment should not apply. Aside from the federal constitutional issues discussed above there is no principle of inalienable right, natural law, or simple justice which would compel this or any other court to disregard the salutary principles of res judicata or estoppel by judgment on such grounds alone.

In *Federated Department Stores, Inc. v. Moitie* (1981) 452 U.S. 394 [69 L.Ed.2d 103] the question was whether the Ninth Circuit created an exception to the doctrine of res judicata. That court had held that res judicata does not bar

relitigation of an unappealed adverse judgment where other plaintiffs in similar actions against common defendants successfully appeal the judgments against them. The United States Supreme Court reversed this decision, stating at page 398 (69 L.Ed.2d at 109): "Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[9]

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[9]In *Federated Department Stores, Inc. v. Moitie, supra*, 452 U.S. 394, the court also stated at page 401 (69 L.ED.2d 110):

> "The Court of Appeals also, rested its opinion on what it viewed as 'simple justice.' But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.' *Heiser v. Woodruff* 327 U.S. 726, 733, (1946). The Court of Appeals' reliance on 'public policy' is similarly misplaced. This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' [Citation.] We have stressed that '[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the court. . . .' "

In this respect there may be a distinction to be drawn between the doctrine of res judicata and that of estoppel by judgment. In *Chern v. Bank of America* (1976) 15 Cal.3d 866, the court stated at 872: "We acknowledge, further, a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. In *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749 . . ., for example, we declined to give estoppel effect to bar an administrative agency from relitigating the issue of whether a certain practice by a defendant constituted sufficient cause to revoke a liquor license, noting that the statute authorizing the revocation of licenses 'concerns the public interest in an industry requiring close supervisions.' . . . (2 Davis, *Administrative Law Treatise* (1958)

(footnote continued on following page)

b. As to issues falling within the California Constitution, the doctrines of res judicata and estoppel by judgment do not apply so as to give conclusive effect in *Olson v. Cory I*. Since Proposition 11 constitutes a change in the California law, there is such a change of circumstances that defendants would have been entitled to relitigation of the

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§ 18.03, pp. 558-559.)" (*Federated Department Stores, Inc. v. Moitie, supra*, 452 U.S. 394, 402, conc. Opn. of Blackmun, J., and Marshall, J.)

This distinction between the effect of res judicata and estoppel by judgment is recognized in Restatement Second of Judgments (Tent. Draft No. 4, April 15, 1977 § 68.1): "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigated of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . . (e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial section, (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." (In the tentative draft, Rest.2d Judgments, the term res judicata is called "claim preclusion"; and the term estoppel by judgment, also known as collateral estoppel, is called "issue preclusion.")

Comment on Clause (e) in section 68.1 observes: "g. *Rationale*. As stated in the introduction to Title E, the policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception, and litigation to establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one."

None of the reasons for permitting relitigation of the issues in *Olson v. Cory I*, as described in *Chern* or Tentative Draft No. 4 § 68.1, *supra*, exist in *Olson v. Cory II*. Moreover the relationship between *Olson v. Cory I* and *Olson v. Cory II* rests upon res judicata, and not merely estoppel by judgment; hence *Federated*, *Chern* and section 68.1 (e) are reconcilable with respect to the issues in this case.

issues but for the controlling effect of federal constitutional issues.

4. Does the doctrine of stare decisis compel this Court of Appeal to uphold plaintiffs' rights as adjudicated in *Olson v. Cory I* as to:

a. Issues falling within the federal Constitution? Yes.

Defendants contend that this Court of Appeal is not obliged to follow the decision of the California Supreme Court in *Olson v. Cory I*. Although the Supreme Court of California is free to overrule its own prior decisions (*County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679; *Hart v. Burnett* (1860) 15 Cal. 530, 600-601), the doctrine of stare decisis compels lower tribunals to follow the California Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so. This rule is absolute and there are no exceptions. (*Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; and *Committee to Defend Reproductive Rights v. Cory* (1981) 125 Cal.App.3d 341, 344.)

Defendants contend that stare decisis does not govern because the issues are ones of federal law and that we should look to the United States Supreme Court and not to the California Supreme Court for guidance. We are not confronted here with a United States Supreme Court case squarely holding one way, and the California Supreme Court holding to the contrary. We do have a situation in which the California Supreme Court in *Olson v. Cory I* is in complete accord with applicable United States Supreme Court precedents that apply federal constitutional doctrine to state contract rights. Hence we do not even have to consider the effect of *Jefferson v. Chronicle Publishing Co.* (1925) 108 Cal.App.2d 538, 539 teaching that intermediate tribunals

must look to decisions of the California Supreme Court upon questions of federal constitutional law.

b. Issues falling within the California Constitution.

For the same reasons as are set forth in paragraph 3.b. *supra*, we reach the same conclusions.

The judgment of the trial court is corrected as set forth in paragraph 2, *supra*, by striking out the words "and California" in the two places where such words occur, and as modified herein the judgment is affirmed.

CERTIFIED FOR PUBLICATION.

LAVINE, J.*

We concur:

ASHBY, Acting P.J.

HASTINGS, J.

Dickran M. Tevrizian, Jr., Judge
Superior Court of Los Angeles County

---

Stroock & Stroock & Lavan; William H. Levit, Henry J. Silberberg, Margaret A. Nagle, for Petitioners, Plaintiffs and Respondents.

George Deukmejian, Attorney General; Richard D. Martland, Assistant Attorney General; Henry G. Ullerich, Deputy Attorney General, for Respondents, Defendants and Appellants.

---

*Assigned by Chairperson of the Judicial Council.

**Modification of Opinion.**

Certified for Publication.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Lester E. Olson, Edwin F. Beach, Charles Bierschbach, Gerald Brown, Hugh A. Evans, et al., Petitioners, Plaintiffs and Respondents, v. Kenneth Cory, as Controller of the State of California, et al., Respondents, Defendants and Appellants. 2d Civil No. 63644. (Super. Ct. No. CA 000662).

Filed: July 22, 1982.

THE COURT:

It is ordered that the opinion filed herein on June 25, 1982, be modified in the following particulars:

1. On page 16, line 1, insert "a." before the words "*Olson v. Cory I*,"

2. On page 17 at the end of the first full paragraph, insert a period after the word "Constitution." and delete the words: "(Complaint par. 23 and Answer par. 23). [JA 9, 10, 25]"

3. On page 25, the last line of footnote 6, insert the numbers "621, 638-640," after "450 U.S." so that the citation will read "450 U.S. 621, 638-640."

4. On page 31, footnote 9, after the word "opinion" appearing on the fourth line down, insert the words "in part . . ."

5. On page 32, 9 lines up from the bottom of the page, the word "section" is changed to "action, . . ."

6. On page 34 at the end of the first full paragraph, after the numbers "455" change the semicolon to a period and delete the words "and *Committee to Defend Reproductive Rights v. Cory* (1981) 125 Cal.App.3d 341, 344.)"

7. On page 35, line 18, after word "affirmed." add the following sentence: "Respondents shall be entitled to their costs on appeal."

## APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

September 8, 1982.

*I have this day filed Order* HEARING DENIED.

*In re:* 2 civil *No.* 63644 Lester E. Olson et al. *vs.* Kenneth Cory et al.

*Respectfully,*

*Clerk*

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-917
IN THE

# Supreme Court of the United States

October Term, 1982

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Petitioners,*

*vs.*

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.

WILLIAM H. LEVIT,
HENRY J. SILBERBERG,
MARGARET A. NAGLE,
of STROOCK & STROOCK & LAVAN,
1801 Century Park East,
Los Angeles, Calif. 90067,
(213) 556-2100,
EDWARD R. KORMAN,
of STROOCK & STROOCK & LAVAN,
61 Broadway,
New York, New York 10006,
(212) 425-5200,
*Counsel for Respondents.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## Question Presented.

Whether a writ of certiorari should issue to review the correctness of a prior holding of the Supreme Court of California, which was followed by the California Court of Appeal in the present case, that a statute fixing judicial salaries created a contractual obligation which could not be abridged during the judge's term of office where: (1) the issue has been resolved by an amendment to the Constitution of California, effective January 1, 1981, thus precluding any contractual obligation from arising as to any judicial term of office commencing after that date; (2) according to the Petition for Writ of Certiorari, the holding below confers benefits, which will expire in, at most, four years, on only a few appellate justices and judicial pensioners; (3) the issue turns, in the first instance, on questions of state law, which have been determined by the highest court of the State of California; and (4) the applicable doctrines of *res judicata* and estoppel by judgment preclude relitigation of the issue presented?

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Introductory Statement | 1 |
| Argument | 4 |
| A. The Issue Presented by the Petition Is Not of Sufficient Importance to Justify This Court's Review | 4 |
| B. The Federal Constitutional Issue Presented Turns on a Question of State Law Which Has Been Resolved by the California Courts in Accordance With the Applicable Decisions of This Court | 5 |
| C. The Doctrines of Res Judicata and Estoppel by Judgment Preclude Petitioners From Relitigating the Federal Constitutional Issues Conclusively and Finally Adjudicated in Respondents' Favor in Olson v. Cory I | 9 |
| Conclusion | 10 |

# TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Atlantic Coast Line R. Co. v. Phillips, 332 U.S. 168 (1947) | 6 |
| Betts v. Board of Administration, 21 Cal. 3d 859, 582 P.2d 614 (1978) | 8 |
| Butler v. Pennsylvania, 51 U.S. 402 (1850) | 7, 8 |
| Dodge v. Board of Education, 302 U.S. 74 (1937) | 6, 7, 8 |
| Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) | 9, 10 |
| Frank v. Board of Administration, 56 Cal. App. 3d 236, 128 Cal. Rptr. 378 (1976) | 8 |
| Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947) | 8 |
| Lyon v. Flournoy, 271 Cal. App. 2d 774, 76 Cal. Rptr. 869 (1969) | 8 |
| Olson v. Cory, 27 Cal. 3d 532, 609 P.2d 991 (1980) ("Olson v. Cory I") | 2, 3, 4, 5, 7, 8, 9, 10 |
| Olson v. Cory, 134 Cal. App. 3d 85, 184 Cal. Rptr. 325 (1982) ("Olson v. Cory II") | 3, 4, 7 |
| Phelps v. Board of Education, 300 U.S. 319 (1937) | 6 |
| Pineman v. Oechslin, 637 F.2d 601 (2d Cir. 1981) | 7 |
| State of Indiana Ex Rel. Anderson v. Brand, 303 U.S. 95 (1938) | 5, 7 |
| United States v. Will, 449 U.S. 200 (1980) | 7 |
| **Constitutions** | |
| United States Constitution, Article III, Section 1 | 7 |

No. 82-917

IN THE

# Supreme Court of the United States

October Term, 1982

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

*Petitioners,*

*vs.*

LESTER E. OLSON, EDWIN F. BEACH, CHARLES BIERSCHBACH, GERALD BROWN, HUGH A. EVANS, JOHN G. GABBERT, ROY L. HERNDON, MARCUS M. KAUFMAN, F. LAWRENCE PLOTKIN, EDWIN J. REGAN, JAMES B. SCOTT, and ROBERT O. STANIFORTH,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE.

### Introductory Statement.

The Petition for Writ of Certiorari ("Petition") seeks review of a decision of the Court of Appeal of the State of California which the Supreme Court of California declined to review. The decision: (1) properly followed a recent decision of the Supreme Court of California which held that a statute providing for automatic, unlimited cost-of-living salary increases for judges constituted a contractual obli-

gation that could not be abridged for the duration of the term of office of any judge to whom the statute had been applied upon the commencement of the judge's term of office; and (2) held that an amendment to the Constitution of the State of California, which specifically sought to overrule the prior decision of the Supreme Court of California and to alter California law by decreeing that statutes fixing judicial salaries are not contractual obligations, could no more abridge vested, contractual obligations than could the previously challenged statute.

The factual background of the case may be briefly summarized as follows: In 1976, the Legislature of the State of California amended a statute providing full annual cost-of-living adjustments to judges' salaries by placing a twenty-two month freeze and then a 5% limitation on such adjustments. Subsequently, in *Olson v. Cory*, 27 Cal. 3d 532, 609 P.2d 991 (1980) ("*Olson v. Cory I*"), the Supreme Court of California, construing and applying California law, held, *inter alia*, that the subject statute, as it existed immediately prior to the challenged amendment, constituted a contractual obligation, protected by the Contracts Clauses of the United States and California Constitutions, which could not be altered to reduce the cost-of-living increases payable to judges whose terms had commenced prior to the effective date of the amendment — January 1, 1977. The 5% ceiling could, however, be applied to any judge who began a new term *after* the effective date of the amendment. The Supreme Court of California expressly recognized that this holding would, for a temporary period, create some disparity in the salaries of judges, depending on when their terms began. *Olson v. Cory I, supra*, 27 Cal. 3d at 547, 609 P.2d at 1000. However, the Court held that this disparity would end for trial court judges not later than the first

Monday in January 1981, and would end for all appellate justices not later than the first Monday in January 1987.[1]

Subsequently, an amendment to the Constitution of the State of California declared, *inter alia*, that statutes fixing "salaries of judges are not considered an obligation of contract." As noted in the Petition (pp. 6-7), the amendment, effective January 1, 1981, also sought to eliminate the disparities in the salaries of the handful of appellate justices and pensioners which resulted from the holding in *Olson v. Cory I* that the 5% cost-of-living ceiling could be applied only to judges and justices whose terms of office commenced on or after January 1, 1977.

Thereafter, in *Olson v. Cory*, 134 Cal. App. 3d 85, 184 Cal. Rptr. 325 (1982) ("*Olson v. Cory II*") (Petitioners' Appendix ("Appendix") pp. 1-24), the Court of Appeal of the State of California held that the portion of the above-described constitutional amendment which specifically sought to apply the 5% limitation to judges whose terms of office commenced *before* January 1, 1977, violated the Contracts and Due Process Clauses of the United States Constitution. The Court of Appeal, citing relevant authorities (Appendix pp. 11-13), correctly reasoned that the contractual obligation which arose when the Legislature enacted a statute mandating unlimited cost-of-living increases could no more be altered by an amendment to the state constitution than by amendment of the original statute. The Court of Appeal also properly concluded (Appendix pp. 19-21) that the holding in *Olson v. Cory I*, establishing that contractual obligation, could not be relitigated to deprive respondents of their rights which were conclusively adjudicated in *Olson v. Cory I*.

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[1]In the case of appellate justices with "protected terms," such terms would end in either January 1983 or January 1987.

## ARGUMENT.

### A. The Issue Presented by the Petition Is Not of Sufficient Importance to Justify This Court's Review.

The petitioners do not argue that, if a contractual obligation arose under a California statute providing annual cost-of-living salary adjustments for judges, the California courts erroneously applied the Contracts Clause of the United States Constitution. Rather, petitioners essentially seek a review and reversal of the holding of the Supreme Court of California in *Olson v. Cory I*, which construed such a California statute as creating a contractual obligation. The review sought by petitioners is of limited significance, however, because by amendment of the Constitution of the State of California, effective January 1, 1981: "Laws setting the salaries of judges shall not constitute an obligation of contract. . . ." (Appendix p. 2.)

While for a short period of time, ending not later than January 1987, the holding in *Olson v. Cory I* will continue to have some restricted effect, it is clear that no new "protected terms" can arise after January 1, 1981, due to the amendment of the California Constitution. Thus, contrary to petitioners' assertions, and within a limited period of time, there will be no restriction, pursuant to either *Olson v. Cory I* or *Olson v. Cory II*, on the power "of the State Legislature and the People of the State of California to prospectively adjust compensation during a term of office." (Petition p. 11.)

Perhaps recognizing that the issue they seek to have reviewed is not of sufficient importance to warrant review by this Court, petitioners appear to suggest that the salary disparity which benefits the few justices and judicial pensioners who will continue to have their salaries and pensions fixed

in accordance with the holding in *Olson v. Cory I*,[2] in and of itself, provides a basis for review. (Petition pp. 11-12.) Surely, the Supreme Court of the United States does not sit to correct temporary disparities in the salaries of state court judges, which do not involve any significant issue of law, and have been adjudicated by a decision of the highest court of the State of California.

**B. The Federal Constitutional Issue Presented Turns on a Question of *State* Law Which Has Been Resolved by the California Courts in Accordance With the Applicable Decisions of This Court.**

As petitioners expressly concede (Petition p. 13), quoting from *State of Indiana Ex Rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), in considering whether a state statute impairs the obligation of a contract under the federal constitution, the existence of the contract, while a federal question, is "to be determined 'by an appraisal of the statutes of the state and the decisions of its courts.' " Accordingly, the issue presented by the Petition turns, in the first instance, on the scope of review applicable to the holding of the Supreme Court of California in *Olson v. Cory I* — interpreting California law — that a statute enacted by the Legislature of the State of California created a contractual obligation. Moreover, petitioners' assertions that the holding of *Olson v. Cory I* — that a contractual obligation exists

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[2]As the Petition correctly states (pp. 6-7), there were only four Supreme Court justices and twenty-three justices of the Courts of Appeal (and at the most an equal number of judicial pensioners), who were held to have "protected terms" under *Olson v. Cory I* and were thus entitled to full cost-of-living increases until the end of their terms in January 1983 or January 1987. It was this small group whose salaries (and pensions) were sought to be equalized by the constitutional amendment which took effect on January 1, 1981. (Petition pp. 6-7, 11-12.) Due to the completion of terms, retirements and deaths, this group will have been reduced, as of January 3, 1983, to one Supreme Court justice, nine Court of Appeal justices and not more than ten judicial pensioners.

— "is not binding on this court" (Petition p. 12) and is in conflict with prior decisions of this Court (*id.*) are simply misguided and reflect petitioners' apparent inability to comprehend fully the hybrid nature of issues involving application of the Contracts Clause.

This Court has long held that "where a statute is claimed to create a contractual right," it must give "weight to the construction of the statute by the courts of the state," and, "[u]nless these views are *palpably erroneous* . . . [it] should accept them."[3] *Phelps v. Board of Education*, 300 U.S. 319, 322-323 (1937). *See also Dodge v. Board of Education*, 302 U.S. 74, 79 (1937). Petitioners have not cited (nor have respondents discovered) a single decision in which, under the Contracts Clause of the United States Constitution, this Court has reversed a state court judgment holding that contractual rights existed under the applicable state law and that they were unconstitutionally impaired. Indeed, the cases cited by petitioners involve review of state court determinations that a contract *did not* exist. Because

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[3]This standard of review is most severely restricted when matters of local policy are at issue. As Mr. Justice Frankfurter observed in *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170 (1947):

> [W]hile it is true that we are not bound by the construction of local statutes by the local courts in deciding the . . . question [of whether an obligation of contract has been impaired in violation of the Contracts Clause], 'yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result.'

This case, as petitioners concede, involves a similar matter of local policy. As petitioners observe: "The relationship between a state and its employees, officers and judges is a matter that should peculiarly rest with the people of that state. . . ." (Petition p. 12.) The decision of the Supreme Court of California that a contractual obligation was created by a statutory scheme which was aimed at keeping judicial salaries current with the rate of inflation hardly creates "real oppression or manifest wrong in the result" and plainly does not undermine the values reflected by the Contracts Clause.

such holdings — if given controlling effect — could make the Contracts Clause a "dead letter" by determining that no protectable contract rights exist under state law, they cannot be regarded as "binding" on this Court, even though they will be accorded "great weight." *State of Indiana Ex Rel. Anderson v. Brand, supra*, 303 U.S. at 100. In the present case, however, the Supreme Court of California found that a contractual obligation existed under the laws of the State of California, and it enforced that obligation in accordance with the dictates of the Contracts Clause. It is thus unnecessary for this Court to exercise its discretionary jurisdiction to determine whether the Supreme Court of California was "evad[ing] the restraint of the [Contracts] Clause by determining, through legislation or adjudication, that an arrangement previously regarded as a contract was no longer enforceable." *Pineman v. Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981).

Furthermore, and despite petitioners' contrary contentions, the holdings of the California Supreme Court and Court of Appeal in *Olson v. Cory I* and *Olson v. Cory II* are not in conflict with this Court's decisions in *United States v. Will*, 449 U.S. 200 (1980); *Dodge v. Board of Education*, 302 U.S. 74 (1937); and *Butler v. Pennsylvania*, 51 U.S. 402 (1850). Petitioners' citation of *United States v. Will, supra*, is simply inapposite, because that case dealt with the construction of *federal statutes* providing for compensation of federal judges in the light of the Compensation Clause (Article III, Section 1) of the United States Constitution and *not* the Contracts Clause. *Dodge* and *Butler* hold only that the Contracts Clause of the United States Constitution creates no *independent* contractual right to public office or compensation therefor. If, as in *Dodge* and *Butler*, no such right exists under state law, the federal Contracts Clause does not create that right. On the other hand, if such

a right exists as a matter of state law, a federal court will enforce it, and *Dodge* and *Butler* do not hold to the contrary.

Thus, in *Dodge v. Board of Education, supra*, 302 U.S. 74, the United States Supreme Court affirmed the holding of the Illinois Supreme Court that teachers' pension rights created by Illinois statute were not vested rights *under Illinois law* and, therefore, were not protected from modification or elimination by the Contracts Clause of the United States Constitution. Similarly, in *Butler v. Pennsylvania, supra*, 51 U.S. 402, this Court, analyzing Pennsylvania law, affirmed the holding of the Pennsylvania Supreme Court that canal commissioners appointed and compensated pursuant to Pennsylvania statutes did not have vested rights *under Pennsylvania law* to promised compensation.

In sum, in determining whether respondents have contractual rights to their promised compensation, this Court must look to California law, as previously pronounced by the California Supreme Court in *Olson v. Cory I*,[4] and not to federal decisions dealing with public employees' rights to salary and pensions in other states or the federal system. It is clear that respondents have vested, contractual rights

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[4]A long line of California cases, culminating in *Olson v. Cory I*, has firmly established, under California law, "the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment"; and such rights are protected by the Contracts Clause of the United States Constitution. *Olson v. Cory I, supra*, 27 Cal. 3d at 540, 609 P.2d at 996. *See also Betts v. Board of Administration*, 21 Cal. 3d 859, 582 P.2d 614 (1978); *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P.2d 799 (1947); *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 76 Cal. Rptr. 869 (1969); *Frank v. Board of Administration*, 56 Cal. App. 3d 236, 128 Cal. Rptr. 378 (1976). In *Olson v. Cory I*, the Supreme Court of California, relying on these and other relevant cases and distinguishing various earlier California decisions, concluded that a judge's promised compensation is also protected by the Contracts Clause of the United States Constitution. *See Olson v. Cory I, supra*, 27 Cal. 3d at 538, 538 n. 3, 540-542, and 540 n. 4, 609 P.2d at 994, 994-995 n. 3, 995-997, and 995 n. 4.

to their compensation under California law, and that such rights, having come into existence under California law, are protected by the Contracts Clause of the United States Constitution.[5]

### C. The Doctrines of *Res Judicata* and Estoppel by Judgment Preclude Petitioners From Relitigating the Federal Constitutional Issues Conclusively and Finally Adjudicated in Respondents' Favor in *Olson v. Cory I*.

The judgment in *Olson v. Cory I* adjudicated, *inter alia*, that a few appellate justices had vested rights to full cost-of-living salary increases until the end of their terms in January 1983 or January 1987. That judgment became final in June 1980. Those justices and a small number of judicial pensioners, whose pensions are calculated as a percentage of such justices' salaries, have been paid the full amount of cost-of-living increases due from September 1977 to January 1981. The only unexecuted part of the judgment is the money due them which has been withheld by the state because of the constitutional amendment, effective January 1, 1981, pending the adjudication of the case at bench.

Under principles of *res judicata* and estoppel by judgment properly applied by the Court of Appeal in this case (Appendix pp. 19-22), and recognized by this Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981):

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor

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[5]Respondents believe that their discussion of the Contracts Clause issue also disposes of the Due Process Clause issue. With respect to the Due Process Clause issue, reference is also made to the disposition of this issue by the Court of Appeal. (*See* Appendix pp. 16-18.)

> are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. . . . We have observed that '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.'

As pointed out by the Court of Appeal, a subsequent state constitutional amendment does not constitute such a change in the "applicable legal context" as to preclude application of the doctrines of *res judicata* and estoppel by judgment with respect to the federal constitutional issue. (*See* Appendix pp. 11-13, 19-20.) Moreover, in accordance with the principles enunciated in *Federated Department Stores, Inc. v. Moitie, supra*, even if this Court were to review the case at bench and determine that the Supreme Court of California had incorrectly determined the federal constitutional issue in *Olson v. Cory I*, such a determination would not preclude application of the doctrines of *res judicata* and estoppel by judgment to enforce the final judgment in favor of respondents in *Olson v. Cory I*.

**Conclusion.**

For the reasons set forth above, it is submitted that the Petition should be denied.

Respectfully submitted,

WILLIAM H. LEVIT,
HENRY J. SILBERBERG,
EDWARD R. KORMAN,
MARGARET A. NAGLE,
of STROOCK & STROOCK & LAVAN,
*Counsel for Respondents.*